85-4090

Supreme Court, U.S.
FILED
SEP 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A. Frank Johns
Post Office Box 3585
Greensboro, North Carolina 27402
(919) 275-9567
Counsel for Petitioners

Of Counsel:

David B. Puryear, Jr.

September 9, 1985

QUESTION PRESENTED FOR REVIEW

When parents pursue their administrative procedural remedies under the Education for All Handicapped Children Act, 20 U.S.C. § 1415, and are deprived of findings of fact and a hearing decision, as guaranteed therein, do they state a claim for relief under 42 U.S.C. § 1983 for deprivation of a right secured by federal law?

PARTIES TO PROCEEDING IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT and EDWARD RAY HUNT, Trustee of the Daniel Glen Hunt Fund,

Plaintiffs - Appellants,

v.

A. CRAIG PHILLIPS, State Superintendent of Public Instruction, State of North Carolina; THE NORTH CAROLINA STATE BOARD OF EDUCATION and DAVID BRUTON, Chairman; JOHN A WILLIAMS, State Budget Officer, State of North Carolina; J. A. PORTER, Controller, Department of Public Instruction, State of North Carolina; DOUGLAS MAGANN, Superintendent of Public Instruction, Guilford County, State of North Carolina; GUILFORD COUNTY BOARD OF EDUCATION and EVON DEAN, Chairman; GUILFORD COUNTY BOARD OF COMMISSIONERS and FORREST CAMPBELL, Chairman,

Defendants - Appellees

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented For Review	2
Federal Statutes And Regulations Involved	2
Statement Of The Case	3
Reasons For Granting the Writ	7
1. The decision below conflicts with the decisions of other courts of appeal as to the interplay between 20 U.S.C. § 1415 and 42 U.S.C. § 1983	7
2. The decisions below raise significant and recurring problems concerning enforcement of the right to administrative due process under EHA	10
Conclusion	13
Certificate of Service	14
Certiorari Appendix	

TABLE OF AUTHORITIES

Cases:

Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) 11, 12

Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) 9

Hymes v. Harnett County Board of Education, 664 F. 2d 410 (4th Cir. 1981) 9

Manecke v. School Board of Pinellas County, Florida, 762 F. 2d 912 (11th Cir. 1985) 10

Quackenbush v. Johnson City School District, 716 F. 2d 141 (2nd Cir. 1983) 10

Rose v. Nebraska, 748 F. 2d 1258 (8th Cir. 1984) 10

Smith v. Robinson, ___ U.S. ___ , 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984) 9, 12

Teresa Diane P. v. Alief Independent School District, 744 F. 2d 484 (5th Cir. 1984) 10

Statutes and Regulations:

20 U.S.C. 1401(a)(17), (18) & (19) 11
20 U.S.C. 1415(a)(1)(E) 11
20 U.S.C. 1415(c)(2) 11
20 U.S.C. 1415(d)(4) 8, 12
20 U.S.C. 1415(e)(1) 11
20 U.S.C. 1415(e)(2) 11
28 U.S.C. 1254(1) 2
42 U.S.C. 1983 2
34 C.F.R. 104.33 3
34 C.F.R. 300.508(a)(5) 8
34 C.F.R. 300.512(a)(1) & (2) 8

Miscellaneous:

H. Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267 (1975) 8

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners,

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Daniel Glen Hunt, Edward Ray Hunt and Ellen Hunt, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 9, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, App. 2, is unpublished. The opinion of the United States District Court for the Middle District of North Carolina, App. 9, is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 9, 1985. Petitioners' motion for extension of time to file a petition for rehearing in banc was allowed, and the court of appeals denied the petition on its merits on June 14, 1985. App. 7. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

When parents pursue their administrative procedural remedies under the Education for All Handicapped Children Act, 20 U.S.C. § 1415, and are deprived of findings of fact and a hearing decision, as guaranteed therein, do they state a claim for relief under 42 U.S.C. § 1983 for deprivation of a right secured by federal law?

FEDERAL STATUTES AND REGULATIONS INVOLVED

1. Section 615 of the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. § 1415, the provisions of which appear at pages 70-72, Certiorari Appendix.

2. Title 34 of the Code of Federal Regulations, Sections 300.508(a)(5) and 300.512(a)(1) & (2), provide:

> 508(a) Any party to a hearing has the right to:
>
> (5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).
>
> 512(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:
>
> (1) A final decision is reached in the hearing; and
>
> (2) A copy of the decision is mailed to each of the parties.

3. The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The facts necessary to place the question now raised in its proper setting can be stated briefly:

Petitioner Daniel Glen ("Danny") Hunt is a profoundly retarded, autistic, self-abusive, 18-year-old child.[1] He and his parents, petitioners Ray and Ellen Hunt, live in Guilford County, North Carolina. During the school years 1976 through 1980, Danny received education, habilitation and behavior modification in a private special residential school for autistic children in Nashville, Tennessee. This program was funded by payments from a charitable fund created for Danny, and by annual $2,000 payments from the North Carolina Department of Public Instruction ("state education agency" or "SEA"), co-defendant below.

When the charitable fund began to run out in 1979, the Hunts realized they no longer could afford the private residential program. They requested that the respondent Guilford County Board of Education ("local education agency" or "LEA") provide Danny with a residential program of special education and related services, pursuant to the provisions of the EHA and regulations promulgated under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. See, 34 C.F.R. § 104.33. The LEA refused, and the Tennessee residential school closed. Danny continued to reside with a former teacher from the defunct Tennessee facility. The Hunts,

---

[1] Danny remains eligible for services under the Education for All Handicapped Children Act until he reaches age 21. See, 20 U.S.C. § 1412(2)(B).

through counsel, met with representatives of the SEA, the LEA, and the North Carolina Department of Human Resources ("DHR"), third-party defendants in the district court. App. 23.

Petitioners disclosed their intention to file federal suit. Thereafter, DHR agreed to fund a residential placement for Danny at a local mental retardation habilitation center operated by the Guilford County Area Mental Health, Mental Retardation and Substance Abuse Authority ("local mental health agency"). App. 23. In North Carolina, institutional and group home residential habilitation services for mentally handicapped persons are a joint undertaking of the state, through DHR, and local political subdivisions of the state, through the local mental health agencies created under Chapter 122 of the North Carolina General Statutes. A year-round residential placement has been provided to Danny by the local mental health agency since 1980, using funds provided by DHR. A daytime special educational classroom program has been provided by respondent, during the regular nine-month academic year. App. 24.

However, respondent never conceded any legal obligation to provide, and never has provided, an "individualized education plan" for Danny which included residential placement. App. 24. The funding for the local mental health agency placement was the subject of an agreement between the local mental health agency and DHR. The agreement provided for its termination at any time by either party, and for annual renegotiation. Respondent has affirmatively argued on appeal in the circuit court that the local mental health agency is not an entity governed either by EHA or by the Department of Education regulations promulgated under Section 504 of the Rehabilitation Act.

The parent-petitioners initiated the EHA administrative hearing process in 1979, when they discovered that Danny would have to leave the private residential facility in Tennessee. The parents subsequently abandoned their hearing opportunity, having been led to believe that the respondent LEA was going to defray the cost of the private placement, when the impending exhaustion of the charitable fund occurred. App. 18-19. Respondent did not pay for the private residential placement, however. When the parents discovered this, and

that Danny would be discharged from the private school, they again demanded a hearing. App. 22.

The parents, in the hearing, sought from the local school system both future placement in an appropriate residential special education program, and reimbursement of funds expended for Danny's past private placement.[2] App. 22-23.

The administrative hearing officer convened the hearing on October 26, 1979. Record evidence was taken as to Danny's condition and needs, then the hearing officer adjourned and continued the hearing, to allow the LEA and the parents to consult with other public agencies concerning available services. App. 23.

Thereafter, Danny's residential placement on "an emergency, humanitarian basis", in the local mental health agency facility was arranged. App. 23, 24, 25, 57, 62. But, no state or public agency, including respondent, would admit any legal obligation to provide to Danny a 24-hour-per-day, 365-day-per-year residential placement, in order to comply with EHA and 34 C.F.R. § 104.33.[3] App. 25-26. The respondent LEA took the position (and maintains to this day) that Danny does not need and is not legally entitled to a residential

---

[2] No issue of reimbursement is brought forward in this petition. Most, if not all, of the expenses associated with Danny's private educational services were defrayed by a charitable fund collected for Danny's benefit. The district court concluded that Danny's father, petitioner Edward Ray Hunt, was not a proper party to claim reimbursement for the charitable fund. App. 36-37. This was assigned as error in the circuit court.

[3] The district court dismissed as moot petitioners' claims for prospective declaratory and injunctive relief to adjudicate whether Danny is legally entitled to comprehensive residential therapeutic services, and if so, to affix on some defendant agency legal responsibility for the provision of these services. The district court found that there was no reasonable possibility that the defendants (collectively) would discontinue the services which Danny has been receiving since 1980. Defendants conceded in the court of appeals that the local mental health agency is not bound to provide due process under EHA. Nevertheless, the district court found that Danny's parents would have to be notified before his current residential program could be continued pending the outcome of any administrative hearings and appeals which the Hunts might initiate in such an event, pursuant to 20 U.S.C. § 1415(e)(3). App. 38. Petitioners do not bring the district court's error on the issue of mootness forward in this petition.

placement in order to benefit from a program of public education. *See,* App. 20, fn. 11, 22, 31.

Faced with respondent's denial of legal responsibility, the Hunts asked for the administrative hearing to be reopened. The LEA's hearing officer reconvened the administrative hearing on February 22, 1980, and for two days took record evidence on the nature of Danny's special educational needs. The attorneys for the parties were directed to file with the hearing officer proposed findings of fact and decision, not later than June 1, 1980. App. 57, 62.

The respondent's administrative hearing officer never has issued the required findings of fact and decision. App. 23, 40, fn. 26, 58, 62. There is no evidence or assertion in the record that respondent ever has attempted to procure the hearing officer's issuance of a decision.

The present action was filed September 29, 1980, alleging, *inter alia,* the failure of respondent to issue a hearing decision, *see,* App. 58, as grounds for relief under 42 U.S.C. § 1983. App. 58, 59. Petitioners specifically prayed for declaratory judgment that the denial of a hearing decision comprised denial of due process and made a general demand for damages. App. 59.

Respondent's answer admitted that no hearing decision had been rendered by its administrative hearing officer. App. 62.

Petitioner's moved for partial summary judgment, but not on the claim of denial of due process. App. 64. Respondent twice cross-moved for partial summary judgment, but did not move for dismissal of the claim of denial of due process. App. 66, 68. No other defendant below raised, by motion or tender of evidence, the issue of the claim of denial of a hearing decision. The transcript of the administrative hearing evidence was not made a part of the district court record.

Nevertheless, the district court addressed, on its own intiative, the due process violations raised by the pleadings. The district court concluded that the violation inherent in the deprivation of findings of fact and hearing decision was cognizable only under 20 U.S.C. § 1415, and that an action under 42 U.S.C. § 1983 on these grounds would be inconsistent with the EHA enforcement mechanism. App. 44-47. The

district court's discussion of the problem does not reach much further than this. Apparently the district court further reasoned that reimbursement for private educational services was the only available EHA remedy for any violation of the Act. App. 33, 46, 51. The district court concluded that reimbursement was not appropriate relief on the facts of this case. App. 33-37. Thus, the district court seemingly felt free to dismiss the action, without any sanction being imposed on the LEA for denying to petitioners the binding administrative adjudication which it was their right to obtain under EHA. The district court in any event dismissed the entire action. App. 52.

Neither the petitioners nor the respondent sought summary judgment or tendered evidence to support summary judgment on the claim for relief arising from the denial of a hearing decision. No evidence was submitted by any defendant below to controvert respondent's admission that no administrative hearing decision was rendered. No evidence was submitted by any party below on the factual issues of the existence or extent of harm to petitioners resulting from the deprivation of a written administrative hearing decision. The district court made no finding of uncontroverted fact concerning injury to petitioners resulting from the procedural due process denial. *See* App. 23. Consequently, the district court's decision on this issue must be viewed as a dismissal for failure to state a claim upon which relief could be granted either under 42 U.S.C. § 1983 or 20 U.S.C. § 1415. *See* App. 51. The court of appeals' *per curiam* affirmance does not address the issue, though it was assigned as error and argued extensively by petitioners and respondent on the appeal.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE INTERPLAY BETWEEN 20 U.S.C. § 1415 AND 42 U.S.C. § 1983.

Section 1415 of Title 20 of the United States Code grants to parents of handicapped children a "right" to obtain written

findings of fact and a written decision in an administrative hearing, conducted to resolve complaints of denial of appropriate educational services to be provided in compliance with the Education for All Handicapped Children Act ("EHA"). 20 U.S.C. § 1415(d)(4). These procedural rights are mirrored in the federal Department of Education regulations promulgated under the authority of the act. 34 C.F.R. §§ 300.508(a)(5), 300.512(a)(1) & (2).

The district court addresses the petitioners' complaints concerning the administrative process at several points in its memorandum opinion. The district court purported to find as a fact the following:

> When the Hunts voiced complaints about the decision of the local education defendants concerning Danny's placement upon his return for the 1979-1980 school year, defendants did not deny the Hunts any avenue for administrative relief under state law or make a sham of those avenues. App. 47.

The district court's purported finding of fact is clearly contrary to the respondent's judicial admission in the record. The respondent admitted that no written findings of fact or hearing decision were ever entered by the respondent's hearing officer. App. 62. One plain form of denial of an avenue of administrative relief is the failure or refusal to make a decision on the record. *See,* H. Friendly, "Some Kind of Hearing," 123 U.Pa. L. Rev. 1267, 1278 *et. seq.* (1975).

And yet, the district court erroneously concluded that:

> To the extent a plaintiff would complain that officials failed to comply with the procedures set out in federal and state law, he would have a cause of action for that compliance under the EAHCA and could recover reimbursement. *Anderson v. Thompson,* 658 F.2d at 1214. Here, plaintiffs took advantage of administrative remedies available under state and federal law and exhausted those remedies. See, *Hymes v. Harnett County Board of Education,* 664 F.2d 410 (suit under § 1983 allowable where court cannot acquire jurisdiction under EAHCA to pass upon alleged illegality). At least as to those matters here arising after the EAHCA became binding on North Carolina school systems, the Court has

jurisdiction and can grant appropriate relief under the EAHCA. As to those matters such relief is exclusive in light of the comprehensive nature of the EAHCA's remedial scheme. See, *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 101 S. Ct. 1531, 67 L.Ed.2d 694 (1981). (Where the governing statute provides an exclusive remedy, § 1983 is not applicable). App. 46.

The Fourth Circuit affirmed the district court's dismissal of the entire action, including petitioners' claims under 42 U.S.C. § 1983 for denial of administrative due process, without discussion of the issue. App. 4, 6. This holding is in apparent conflict with the Fourth Circuit's own prior opinion in *Hymes v. Harnett County Board of Education,* 664 F.2d 410 (4th Cir. 1981). The decisions below are also in substantial conflict with the decisions of several other federal courts of appeals which have addressed this issue of jurisdiction under EHA and 42 U.S.C. § 1983 in circumstances where procedural violations arising in the administrative enforcement scheme under EHA are alleged.

This Court, last term, expressly noted the existence of this "confusion" in the federal circuits on the issue presented in the present case. *Smith v. Robinson,* ___ U.S. ___ , n. 8, & ___ , n. 17, 104 S.Ct. 3457, 3465, n. 8, & 3470-71, n. 17, 82 L. Ed. 2d 746 (1984) (citing *Hymes*). Although this Court found it unnecessary in *Smith v. Robinson* to decide the issue here presented, the question is one which has arisen frequently in the federal circuits. Unlike *Smith v. Robinson,* the present case cannot be resolved by an alternative factual determination of ineligibility for the mone-tary relief sought. If it be conceded that a claim under 42 U.S.C. § 1983 is available in this case, the petitioners have been denied an opportunity to present proof of damages flowing from the due process violation. If the judgment of dismissal below is reversed, then petitioners are entitled to proceed to jury trial to recover at least nominal damages and to prove the actual damages proximately resulting from the deprivation of EHA procedural rights. *Cf., Carey v. Piphus,* 435 U.S. 247, 262, 266, 98 S. Ct. 1042, 1051, 1054, 55 L. Ed. 2d 252 (1978).

Several circuits have followed the lead of the *Hymes* decision in concluding that 42 U.S.C. § 1983 is an available source of relief for denials of procedural due process to par-

ent's bringing complaints under EHA. See, *e.g.*, the Second Circuit's ruling in *Quackenbush v. Johnson City School District,* 716 F.2d 141 (2nd Cir. 1983), *cert. denied,* ___ U.S. ___ , 104 S. Ct. 1426, 79 L. Ed. 2d 750 (1984), rejecting the argument that a plaintiff denied the opportunity to avail herself of the procedural safeguards established in the EHA was restricted to relief solely under the EHA, and holding that 42 U.S.C. § 1983 supplies the right of action to a plaintiff who has been denied those procedural safeguards. *Quackenbush,* 716 F.2d at 148. A very recent Eleventh Circuit opinion, *Manecke v. School Board of Pinellas County, Florida,* 762 F.2d 912 (11th Cir. 1985), follows the *Quackenbush* decision, as well as *Teresa Diane P. v. Alief Independent School District,* 744 F.2d 484 (5th Cir. 1984), and *Rose v. Nebraska,* 748 F.2d 1258 (8th Cir. 1984), in holding "that where, as here, the local educational agency deprives a handicapped child of due process by effectively denying that child access to the heart of the EHA administrative machinery, the impartial due process hearing, an action may be brought under § 1983." *Manecke,* 762 F.2d at 919.

The Fourth Circuit's summary affirmance of the district court's memorandum opinion below is in conflict with the cited post-*Smith v. Robinson* circuit court opinions addressing the interplay between EHA and 42 U.S.C. § 1983. This conflict justifies a grant of certiorari to review the judgment below.

2. THE DECISIONS BELOW RAISE SIGNIFICANT AND RECURRING PROBLEMS CONCERNING ENFORCEMENT OF THE RIGHT TO ADMINISTRATIVE DUE PROCESS UNDER EHA.

The Fourth Circuit and district court opinions below treat important statutory and policy considerations growing out of the administrative procedural rights accorded parents and handicapped children under EHA. After having had occasion to raise these issues in *Smith v. Robinson,* this Court chose to leave them undecided. There are compelling reasons why a definitive guideline for application of 42 U.S.C. § 1983 to procedural due process violations under EHA should now be resolved by this court. Efforts to create federal jurisdiction

under 42 U.S.C. § 1983, in circumstances where the EHA administrative hearing process breaks down, are common occurrences. Both litigants and lower courts need the assistance of this court in understanding the appropriate resolution of this interplay between the EHA due process rights and 42 U.S.C. § 1983.

In *Board of Education v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), this Court noted that "the importance Congress attached to these procedural safeguards [embodied in § 1415] cannot be gainsaid." *Rowley,* 458 U.S. at 205, 102 S. Ct. at 3050. However, the court action provided by the terms of 20 U.S.C. § 1415 is available only to a "party aggrieved by the findings and decisions... with respect to the complaint presented pursuant to this Section..." 20 U.S.C. § 1415(c)(2). By its terms, the statute limits the subject matter which may be heard in a court action thereunder to an "appeal," 20 U.S.C. § 1415(e)(1), to review "the findings and decision" of an impartial hearing officer appointed by a local or state education agency in compliance with the Act. 20 U.S.C. § 1415 (e)(2).

Further, the aggrieved party may bring a civil action only "with respect to the complaint presented pursuant to this section." *Id.* Subsection (a)(1)(E) of § 1415 limits the subject matter of "the complaint presented pursuant to this section" to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free, appropriate public education to such child." A complaint of denial of the EHA procedural right to written findings and decision on the record is not a "matter relating to the identification, evaluation or educational placement of the child, or the denial of a free, appropriate public education to such child." *See,* 20 U.S.C. §§ 1401(a)(17), (18) & (19). Thus, the procedural safeguards of the Act do not provide an avenue for the parents to pursue a complaint and obtain an impartial, binding adjudication, with respect to the failure of the education agency to comply with these very procedural safeguards.

The complaint in this case is that the respondent school system failed to issue or procure the issuance of administrative hearing findings and decision. The district court concluded that 20 U.S.C. § 1415 conferred exclusive jurisdiction to hear this complaint (but that petitioners were not entitled

to relief under EHA in this case.) Neither does the plain language of the statute provide exclusive jurisdictional grounds for complaining of procedural violations, nor does it actually provide subject matter jurisdiction at all.

Yet, these procedures, including the rendering of written findings of fact and a hearing decision, are mandatory under the Act. The Act speaks in terms of "the right to written findings of fact and decisions". 20 U.S.C. § 1415(d)(4). This is consistent with this Court's observation that "it seems to us no exaggeration to say that Congress placed every bit as much emphasis upon the *compliance* with procedures giving parents and guardians a large measure of participation at every stage of the administrative process... as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley,* 458 U.S. at 205-206, 102 S. Ct. at 3050 (emphasis supplied). The present issue is embedded in the heart of EHA. The degree of enforceability of the procedural rights granted to parents by EHA is the measure of the overall efficacy of the statute. The statute serves the compelling public purpose of protecting the constitutional right of millions of handicapped children to equal educational opportunity. *Smith v. Robinson, supra.,* at ____ , 104 S. Ct. at 3468. The legislative mechanism, carefully devised by Congress to achieve this purpose, elevated highly formalized parental participation in the education agency's decision-making process over the adoption of a particular substantive standard for determining the appropriate educational program for the handicapped child. *Board of Educational v. Rowley, supra.* If there is no sanction on the public agencies for denying the parents their statutory procedural rights, then EHA becomes a hollow mockery. By virtue of the doctrine of exhaustion of administrative remedies, the parents of a handicapped child are required to participate (at their own expense, *Smith v. Robinson, supra)* in the formal EHA administrative adjudicatory process, if they believe their child's minimal substantive rights under the Act are being violated. But, by the rule of the decisions below in this case, the education agencies need only refuse to issue any binding administrative hearing decision on the record, and the parents are forced to re-litigate, exclusively under EHA, the substantive and procedural issues in federal court (again, at their own expense, *Smith v. Robin-*

son). By this simple expedient of refusing to decide, the education agencies can double or treble the expense and time required of parents trying to protect their handicapped child. The education agencies apparently may do this with impunity, if the holdings below are allowed to stand uncorrected.

The issue of the appropriate jurisdictional vehicle for protecting these rights secured by federal law has been a recurring and persistent one in the federal courts because the ultimate vitality of the entire EHA turns upon its resolution. It is a question which has required the circuit courts of appeals to attempt to discern the implications of this Court's recent ruling in *Smith v. Robinson*. In the present case, the district court did not have the advantage of the *Smith v. Robinson* decision, and the Fourth Circuit simply declined to discuss it, while implicitly retreating from its own leading decision in *Hymes*. The division and uncertainty over the important statutory issue left unaddressed in *Smith v. Robinson* is still unsettled in the circuit courts and remains a question that commonly arises. Parents of handicapped children and public education officials alike will benefit from a definitive decision which determines the extent to which compliance with the EHA procedural safeguards is subject to enforcement under 42 U.S.C. § 1983. This case requires attention and resolution by this Court.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit and the district court.

Respectfully submitted,
A. Frank Johns
239 North Edgeworth Street
Post Office Box 3585
Greensboro, North Carolina 27402
(919) 275-9567
Counsel for Petitioner

Of Counsel:
David B. Puryear, Jr.

CERTIFICATE OF SERVICE

I certify that on the 9th day of September, 1985, I served the foregoing and attached Petition for Writ of Certiorari and Certiorari Appendix on Respondent by depositing three copies thereof in the United States Postal Service first-class, postage prepaid, addressed as follows:

John W. Hardy, Esq.
James W. Lung, Esq.
Counsel for Guilford County
Board of Education
Post Office Box 419
Greensboro, North Carolina 27402

This the 9th day of September, 1985

A. Frank Johns
Counsel for Petitioners